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RE TAN GEK HONG; EX P AFFIN-ACF FINANCE BHD

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[BANKRUPTCY PROCEEDINGS NO: 29-561-2001-III(I)]
b 15 AUGUST 2003

BANKRUPTCY: *Notice - Setting aside - Grounds for challenging notice - Whether judgment debtor had a counterclaim, set-off or cross-demand against judgment creditor - Whether judgment debtor could not be set up in action* c *in which judgment obtained - Bankruptcy Act 1967, s. 3(1)(i)*

This was an appeal by the judgment creditor ('JC') against the decision of the learned deputy registrar to set aside a bankruptcy notice issued against the judgment debtor ('JD'). The JC entered into a hire-purchase agreement whereby, as owner, it let on hire a vehicle to a firm ('the hirer'). The JD stood as d guarantor of the hirer and the vehicle was insured with an insurance company for RM155,000. The hirer defaulted under the hire-purchase agreement; the JC commenced a suit and obtained summary judgment against both the hirer and the JD. The JC then issued a bankruptcy notice against the JD, which upon being set aside, resulted in this appeal. The real issue in this appeal was whether e the JC's right to be paid the money due under the insurance policy for the loss of the vehicle constituted a counterclaim, set-off or cross-demand which the JD had against the JC and which he could not set up in the action in which the judgment was obtained against him.

f **Held:**

[1] On the facts, the JD relied upon the sum of RM155,000 payable under the policy of insurance in respect of the vehicle as constituting the counterclaim, set-off or cross-demand which he had against the JC. However, the money under the policy of insurance was payable by the g insurance company to the JC (as owner of the vehicle) or to the hirer, not to the JD who was not even a party to the policy or a beneficiary thereunder. As such, it could not be said that the JD had a counterclaim, set-off or cross-demand against the JC for that money. (p 283 a-b)

h **[2]** Further, the money (as a liquidated demand) must have been ascertainable with certainty as between the same parties and in the same right. This condition clearly could not be met here by the JD as the policy of insurance was made between the hirer and insurers, and any money payable thereunder was payable to the JC or hirer and not the JD. (p 283 c)

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[3] The counterclaim, set-off or cross-demand must be between the same parties. This condition could not be satisfied by the JD because it was not difficult to see that the JD did not claim that there was any money owing or due from the JC to him. If there was any money due at all, it was from the insurance company to the JC, which was of no assistance to the JD because it was money due and owing between a third party and the JC. (p 283 f)

[4] The JD's submission that the insurance company was "not a third party per se but an integral co-defendant" to the JC's claim and should have been made a co-defendant by the JC in the first place did not have any merits as until the insurance company was named in the suit as a defendant, it was not even a party to the suit. (p 283 g-h)

[5] The JD was also unable to satisfy the second limb of s. 3(1)(i) of the Bankruptcy Act 1967 *ie*, that he had a counterclaim, set-off or cross-demand against the JC "which he could not set up in the action in which the judgment was obtained" as the JD's submission that "it was only until the JC had made a claim on the insurance that the set-off or cross-demand came into play" had, on the facts, no merits. (p 284 a-g)

[Appeal allowed.]

Case(s) referred to:
Ratna Ammal v. Tan Chow Soo [1971] 1 MLJ 277

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, r. 95(1)

For the judgment creditor - Lina Wee; M/s Charles Ling
For the judgment debtor - Dominique Ng; M/s Dominique Ng & Assocs

Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:
This is the hearing of an appeal brought by the judgment creditor, against the decision of the learned deputy registrar who, on 27 February 2003, set aside a bankruptcy notice issued against the judgment debtor on 11 September 2001.

On 14 August 2003, I allowed the appeal against the deputy registrar's decision. These are my reasons for doing so.

On 12 June 1997 the judgment creditor entered into a hire-purchase agreement whereby, as owner, it let on hire a second-hand dump truck (hereafter 'the vehicle') to a firm trading under the name and style of Tieng King Co. ('the hirer'). The judgment debtor stood as guarantor of the hirer under the hire-purchase agreement. The vehicle was insured with the Pacific Insurance Bhd. (hereafter 'the insurance company'). The sum payable under the policy was RM155,00 for total loss of the vehicle, and the policy covered loss by theft.

The hirer defaulted under the hire-purchase agreement. On 28 July 1998 the judgment creditor commenced a suit in the Sessions Court Kuching, in Suit 52-792-98(II), against the two proprietors of Tieng Hing Co. (as 1st defendant) and the judgment debtor (as 2nd defendant).

It appears that some time on 15 August 1998 the vehicle was lost but it appears that when the action was commenced against the defendants, the judgment creditor was unaware of the loss.

On 10 April 1999 the judgment creditor obtained summary judgment against the 1st defendant as well as the judgment debtor for RM100,246.02 with agreed interest thereon at 1% per month from 26 November 1998 until date of judgment and thereafter at the same rate until full settlement ('hereafter the Judgment of 10 April 1999').

On 11 September 2001 the judgment creditor issued a bankruptcy notice against the judgment debtor, requiring him to pay a sum of RM137,406.68 being the amount due on the judgment of 10 April 1999.

The bankruptcy notice bore the usual indorsement ie, that if the judgment debtor failed to comply with the bankruptcy notice within seven days of service thereof, an act of bankruptcy would have been committed.

The indorsement also contained a notice that "if, however, you have a counterclaim, set-off, or cross-demand, which equals or exceeds the amount claimed by (the judgment creditor), in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained, you must within seven days apply to the court to set aside the notice by filing with the registrar an affidavit of the above effect".

The bankruptcy notice was served on the judgment debtor on 30 October 2001.

Within the time allowed, the judgment debtor did on 5 November 2001 file an affidavit to oppose the bankruptcy notice. In his affidavit the judgment debtor deposed that:

(a) the vehicle was insured with the insurance company for RM155,000 for total loss;

(b) the vehicle was reported lost;

(c) "That payment in respect of the said loss would eventually be paid to" the judgment creditor (see para 9);

(d) "That the sum to be paid in respect of the total loss would exceed the amount claimed" by the judgment creditor (see para 10);

(e) "That such amount claimed from the insurance company would form a counterclaim by me and which I could not set up in the action in which the judgment was obtained" (see para 11).

Based on these reasons the judgment debtor prayed for the bankruptcy notice against him to be set aside.

By r. 95(1) of the Bankruptcy Rules 1969, the filing of an affidavit (such as was done by the judgment debtor) shall operate as an application to set aside the bankruptcy notice.

On 7 November 2001 the judgment creditor filed an affidavit to reply to the assertions made in the judgment debtor's affidavit. In its affidavit, the judgment creditor explained that:

(a) under the hire-purchase agreement the hirer shall be responsible for any loss or damage to the vehicle;

(b) Clause 6 required the hirer to give written notice to the judgment creditor in the event of any insurance claim;

(c) neither the hirer nor the judgment debtor informed the judgment creditor of the loss of the vehicle;

(d) that when the hirer and judgment debtor filed their defence in the Sessions Court suit on 20 November 1998, the loss had already occurred but their defence never raised the issue of the loss nor of any claim against the insurance company.

The judgment creditor then filed a creditor's petition against the judgment debtor on 29 April 2002, claiming that an act of bankruptcy had been committed by the judgment creditor when he failed to comply with the bankruptcy notice of 11 November 2001. The judgment debtor challenged the creditor's petition and filed an application by way of a summons-in-chambers to set aside the creditor's

petition. On 3 September 2002 the deputy registrar dismissed the creditor's petition against the judgment debtor. The judgment creditor has appealed against that decision which now awaits hearing.

On 7 November 2002 the judgment debtor filed a supplementary affidavit in support of his application to set aside the bankruptcy notice. In it he exhibited as 'TGH3' a letter written by the judgment creditor's lawyers to the insurance company, requesting to be paid the insured sum of RM135,000 by way of indemnity under the policy of insurance.

On 27 February 2003, the judgment debtor's application to set aside the bankruptcy notice came up for hearing before the deputy registrar when it was allowed with costs. Hence this appeal.

The real issue in this appeal is whether the judgment creditor's right to be paid the monies due under the policy of insurance for the loss of the vehicle, constitutes a counterclaim, set-off or cross-demand which the judgment debtor has against the judgment creditor and which he could not set up in the action in which the judgment was obtained against him?

In my judgment the above question must be answered in the negative. I say so for the following reasons.

Section 3(1)(i) of the Bankruptcy Act 1967 requires the judgment debtor to "satisfy the court that he has a counterclaim, set-off or cross demand ... which he could not set up in the action in which the judgment was obtained".

There are, accordingly, two limbs to the section, namely, (a) that the judgment debtor has a counterclaim, set-off or cross-demand against the judgment creditor; and (b) which he could not set up in the action in which the judgment was obtained.

To satisfy the first limb of the section, the judgment debtor must show that the counterclaim, set-off or cross-demand which he raises against the judgment creditor, is a counterclaim, set-off or cross-demand "between the same parties and in the same right". Authority for this proposition is the case of *Ratna Ammal v. Tan Chow Soo* [1971] 1 MLJ 277 at p. 280 where the Federal Court held that:

> In our view any counterclaim, set-off, or cross-demand set up by a debtor against the creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the same parties in the same right, as in ordinary actions.

Reverting to the facts of our case, the judgment debtor relies upon the sum of RM155,000 payable under the policy of insurance in respect of the vehicle, as constituting the counterclaim, set off, or cross-demand which he has against the judgment creditor. But the money under the policy of insurance is payable by the insurance company to the judgment creditor (as owner of the vehicle) or to the hirer and not to the judgment debtor who is not even a party to the policy, or a beneficiary thereunder. As such, I just do not see how it can be said that the judgment debtor has a counterclaim, set-off or cross-demand against the judgment creditor for those moneys.

Further, the money (as a liquidated demand) must be ascertainable with certainty as between the same parties and in the same right. This condition clearly cannot be met here by the judgment debtor as the policy of insurance is made between the hirer and the insurers and any money payable thereunder is payable to the judgment creditor or hirer and not the judgment debtor. The right by which that money is payable to the judgment creditor is as owner of the vehicle and person entitled to be paid that money under the policy. I do not think that it can be said, by any stretch of the imagination, by the judgment debtor, who is a guarantor, that he has a claim to the insurance sum in the same right as that of the judgment creditor, or that he has a claim against the judgment creditor for those moneys in the same right as the judgment creditor has against the insurance company for that money. There is just no basis on which he can do so without first having paid off the judgment creditor and thereafter stepping into the shoes of the judgment creditor under the policy of insurance.

Besides, the counterclaim, set-off or cross-demand must be between the same parties. Again, this condition cannot be satisfied by the judgment debtor here because it is not difficult to see that the judgment debtor does not claim that there is any money owing or due from the judgment creditor to him. If there is any money due at all, it is from the insurance company to the judgment creditor, but that is of no assistance to the judgment debtor because it is money due and owing between a third party and the judgment creditor.

The judgment debtor has submitted that the insurance company "is not a third party *per se* but an integral co-defendant" to the judgment creditor's claim and should have been made a co-defendant by the judgment creditor in the first place. I regret I find no merit in this argument. Until the insurance company is named in the suit as a defendant, it is not even a party to the suit. I do not see how, therefore, the judgment debtor is able to say that the insurance company is an "integral co-defendant" in the Sessions Court suit, when it is not.

In my judgment the judgment debtor is also unable to satisfy the second limb of s. 3(1)(i) ie, that he has a counterclaim, set-off or cross-demand against the judgment creditor "which he could not set up in the action in which the judgment was obtained".

On 20 November 1998 a defence was filed on behalf of the judgment debtor in Suit No. 52-792-98(II) at the Sessions Court Kuching. That defence is headed "defence of the 1st and 2nd defendants" and was filed on his behalf as 2nd defendant, by a firm of advocates. The defence is exhibited as 'CP3' to the affidavit by Jong Lin See on 7 November 2001, and was filed on behalf of the judgment creditor to oppose the judgment debtor's application to set aside the bankruptcy notice. A perusal of the judgment debtor's defence shows that no mention is made in it about the counterclaim, set-off or cross-demand which he now claims to have against the judgment creditor. In his affidavit of 5 November 2001 which was filed to oppose the bankruptcy notice, the judgment debtor merely says in para. 11 thereof that the "amount claimed from the insurance company would form a counterclaim by me and which I could not set up in the action in which the judgment was obtained". He has not given any reasons for saying why he could not set it up in the action when he filed his defence, given the fact that in his affidavit he says the vehicle was reported lost on 15 August 1998 while the defence was only filed on 20 November 1998.

In his submissions before me, counsel for the judgment debtor submitted "it is only until the judgment creditor has made a claim on the insurance (as evidenced in exh. TGH3) that the set-off or cross-demand comes into play", that is why the set-off or cross-demand could not be set up in the action in which the judgment was obtained.

I regret I find no merit in this argument. If what the judgment debtor says is correct then his alleged set-off or cross-demand only come into play on 5 February 2002 when the judgment creditor wrote to the insurance company in 'TGH3', but I see that even on 5 November 2001 the judgment debtor was already claiming (in para. 11 of his affidavit) that the amount claimed by the judgment creditor from the insurance company would form a counterclaim which he could not set up in the action! The submission of counsel is totally inconsistent with what is stated in para 11 of the judgment debtor's affidavit of 5 November 2001 and must be rejected as a reason why the counterclaim, set-off or cross-demand could not be set up in the action in which the judgment was obtained.

In the result, for all the above reasons I allowed the appeal with costs and set aside the order of the deputy registrar dismissing the bankruptcy notice.